

# Völkerrechtsblog

Der Blog des Arbeitskreises junger Völkerrechtswissenschaftler\*innen

≡ Navigation



RULE OF LAW GOES GLOBAL SYMPOSIUM

## Revolution or Regression?

FLORIAN HOFFMANN — 3 July, 2015



0 f t g+ p

### *Law and Development after the 'Rights Revolution'*

*Florian Hoffmann*

'Law and development' is all over the place! Indeed, law as development has become a mantra of development discourse deeply entrenched in the programming of the multilateral financial institutions, international development agencies, and civil society organizations, so much so that rule of law promotion has, to an extent, become synonymous with development policy itself. Yet, behind the celebratory chorus of legal scholars-turned-development experts who endorse law as a toolkit for nearly everything lurks considerable ambivalence about what law(s) and which development(s) are actually meant hereby.

Many appear to endorse the rule of law merely as a necessary framework for the market economy, though some emphasise its inbuilt predisposition to be used for individual and collective empowerment, participation and accountability. Some see modern law as a necessary epiphenomenon of capitalism, while others insist on its (relative) autonomy. Some would query whether law's particular role in development has actually changed much over time, whereas others welcome its rise as a critical move against the earlier primacy of economics in development discourse.

### **Law and Development 1.0 to 3.0**

Historically, 'law and development' has evolved from the experimental (and largely failed) transplantation of private law codes in the wake of the 'modernization' paradigm of the late 1960s and 1970s (Law and Development 1.0), via the pinpointing of the asymmetries built into the world economy in the context of the emergence of the concept of a 'right to development' (Law and Development 1.5), and the massive constitution-making bonanza of the 1990s with its emphasis on the rule of law and, in particular, the judicial encirclement of post-transition politics (Law and Development 2.0), to the recent operationalization of 'good governance' through a turn to rights and rights-based development (Law and Development 3.0). The latter has been played out both on the international front, notably in form of the mainstreaming of the 'rights-based approach' (RBA) into virtually all multilateral aid and (development) cooperation frameworks, and on the domestic front through what some have termed a 'rights revolution' that has gripped many post-transition countries by way of an exponential rise of (rights-based)

litigation-driven judicial intervention into such social policy fields as public health, education or housing.

The picture that so far emerges from this third round of the 'movement' is, unsurprisingly, ambivalent: the State, once seen as the main problem in and for development, has been brought back under the auspices of 'new developmentalism' as a regulatory framework to counteract market failure and as the (still) principal addressee of individual and collective rights claims. However, its fiscal and policy space is simultaneously much diminished and it is hard pushed to fulfill the obligations which rights-based development lays upon it, not least as the emphasis on legalization and judicialization that followed in the wake of the 'good governance' agenda puts tight limits on the possibility of (re-)distributional politics. Yet, the 'turn to rights' in development has also shifted the focus away from state and towards individual agency and co-ownership of the development process. As a number of studies since the mid-2000s have shown, legal rights and their judicial enforcement make it possible for communities to signal deficits in (social) policy and to produce decentralized, bottom-up remedies. They can, thus, function as real empowerment and participation devices. However, asymmetries in access to justice and the inherent problems of judicial policy-making can also generate negative effects and even help the re-distribution of public goods towards the better off instead of to the poor.

### **The hidden utopia of rights**

Generally, development now takes place in an environment in which traditional state-based government no longer enjoys a monopoly but is complemented by international,

transnational, private, and hybrid regulatory regimes. Stakeholders, including individuals, governments, private enterprises and organized civil society, are faced with a plurality of regulatory demands that are only partially transparent and accountable or amenable to participation and review. The servicing of markets does provide something of an overarching functional logic for such 'governance', and rights do play a role in keeping counter-hegemonic political projects at bay. Yet, the, perhaps, central characteristic of rights discourse is its inherently transgressive character and the unpredictability of the outcomes it produces. Rights can always be used for and against, to create the substantive path dependencies the critics bemoan and to counteract them.

For the hidden utopia of rights in development is not the empowerment of human rights experts, judges, or the global aid industry, but a radical turning upside down of epistemic and political agency. It is hidden not because it would be concealed from all but a rarefied revolutionary avant-garde but because it is impossible to predict the precise moments and locations of its occurrence. For the instances of authentic empowerment, when the 'freedom' of which, for instance, Amartya Sen's capabilities approach speaks, momentarily frees itself from the constraints of (neo) liberalism and becomes an exercise in substantive self-determination, only emerge between the rigid lines of political economy and out of complex and non-linear interactions that resist schematization. Hence, it is, indeed, the oft-critiqued indeterminacy of law itself which enables emancipatory action, even if this can only ever be part of a broader political militancy for global justice. Rights as the privileged discourse for the articulation of claims to an ever expanding individual and collective identity and against

(perceived) oppressions thereof remain important wedges that keep spaces for wider political contestation open, not least, as has been seen, in relation to that widest of fields, development.

*Florian Hoffmann* is professor of public policy and director at the Willy Brandt School of Public Policy in Erfurt.

This post is part of our conference [symposium “Rule of law goes global”](#), organized with our journal cooperation partner [“Law and Politics in Asia, Africa, and Latin America”](#). The other posts in this series can be accessed [here](#).

ISSN 2510-2567

**Tags:** *Development, Human Rights, Rule of law*



Print



Facebook



Twitter



Email

#### Related

“You can’t be neutral on a moving train”

1 July, 2015

In "Rule of Law Goes Global"

Constitutional authoritarianism, not authoritarian constitutionalism!

31 August, 2017

In "Global South in Comparative Constitutional Law"

In the name of ‘rule of law’

25 March, 2015

In "Allegra - Transitional Justice"

PREVIOUS POST



“You can’t be neutral on a moving train”

NEXT POST

No unalloyed good >

## No Comment

Leave a reply

Logged in as ajv2016. Log out?

**SUBMIT COMMENT**

☐ Notify me of follow-up comments by email.

☐ Notify me of new posts by email.